Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CRAWFORD ELLERBE,

Petitioner,

v.

NORMAN Y. MINETA, Secretary,
Department of Transportation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts erred in excluding relevant evidence by applying the District of Columbia Circuit's comparator standard which is more restrictive than that of other circuits?

2. Whether the lower courts violated Petitioner's Seventh Amendment rights by setting aside the jury's factual determinations and making their own interpretations of the factual evidence?

CORPORATE DISCLOSURE STATEMENT

This is to notify that this petition is filed by Brown & Sherman, LLP, a nongovernmental limited partnership firm, on behalf of Ellerbe Crawford, petitioner, and that there is no parent or publicly held company that owns 10% or more of the corporation stock.

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PETITION FOR WRIT OF CERTIORARI

Ellerbe Crawford petitions for a Writ of Certiorari to reverse the judgment below of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit issued its judgment without published opinion on February 26, 2001, which is reported as 2001 U.S. App. LEXIS 4012 and is set out at App. 1-4 of the Appendix.

The United States District Court for the District of Columbia filed its judgment and order on February 4, 2000, granting respondent's Motion for Judgment As a Matter of Law and dismissing petitioner's Complaint. The opinion is unpublished and is set out at App. 5-16 of the Appendix. Judgment on the verdict for petitioner for $75,000.00 with costs was issued on May 25, 1999 and is set out at App. 17 of the Appendix. The jury returned its verdict on May 25, 1999, on the last day of the trial, which is set out in the trial transcript at App. 18-23 of the Appendix.

On July 19, 2000, the Court of Appeals issued an order denying respondent's Motion for Summary Affirmance, which is set out at App. 24-25 of the Appendix. On May 4, 2001, the Court of Appeals denied petioner's timely petitions for rehearing and for rehearing *en banc*. The orders are set out at App. 26-27 of the Appendix.

Mandate of the Court of Appeals was issued on May 22, 2001 and is set out at App. 4 of the Appendix.

JURISDICTION

The United States District Court for the District of Columbia had jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

Appellate jurisdiction was based on 28 U.S.C. § 1291, when the District Court entered a final judgment. Notice of Appeal was timely filed on March 3, 2000.

This Petition for Writ of Certiorari is filed within 90 days of the entry of the Court of Appeals orders denying timely petition for rehearing and for rehearing *en banc*. This Court has jurisdiction to hear this matter under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Seventh Amendment states that, "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 1981a(c) of 42 U.S.C. titled Jury Trial states, "[i]f a complaining party seeks compensatory or punitive damages under this section –

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3)."

Rule 50(a) of the Federal Rules of Civil Procedure, titled Judgment as a Matter of Law states:

"(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

STATEMENT OF THE CASE

Petitioner Crawford Ellerbe brought employment claims against Respondent Secretary of the Department of Transportation, which is an executive branch federal agency. Petitioner, a male, had been employed since 1980 by the Maritime Administration (MARAD). At the trial he presented evidence that because of his sex and because he had engaged in protected activities, he had been denied promotion and the appropriate compensation he had earned as annual leave.

Petitioner had a master's degree and had finished his PhD coursework when he was hired by the Merchant Marine Academy in Kings Point, New York, as the Director of Candidate Recruitment. While there, he generated a

record number of minority enrollees and had a major role in developing a new academic course. The Merchant Marine Academy, funded in large part by the federal government, produces seamen whose availability during wartime is critical.

In 1980, MARAD, the Academy's federal overseer, offered Petitioner a position as a GS-12 with a promotion to GS-13 within months. That promotion to GS-13 occurred in 1983. In the meantime, a class action of African-American MARAD employees claimed, *inter alia*, denials of promotions. Although not a member of the class, petitioner was deposed and provided testimony regarding his then long overdue promotion. Class counsel advised him to file an EEO charge, which Petitioner Ellerbe did. The following year, on the same day that he withdrew his EEO charge, petitioner was promoted to a GS-13 in the Office of Labor, Training and Safety. Despite his efforts since then, Petitioner has received no other promotions from the Department of Transportation.

When Petitioner's immediate supervisor retired in 1988, his replacement, although also a GS-15, did not have as much specific knowledge regarding Mr. Ellerbe's areas of performance. The new supervisor, Bruce Carlton, relied more upon petitioner, who consequently received less supervision. In 1992, Mr. Carlton's position was elevated to the Senior Executive Service. Although he remained Mr. Ellerbe's immediate supervisor, he provided even less direction and guidance.

A number of projects were discussed at trial. The jury heard detailed testimony of Mr. Carlton's consistently high regard for Mr. Ellerbe's work (5 of the 6 years

Carlton rated Petitioner as "meritorious," the second highest rating). At the same time, Mr. Carlton wrote how circumstances had elevated "considerably" the work level in at least one aspect of Petitioner's position.

After Mr. Carlton left the office in 1994, Petitioner Ellerbe received even less supervision. The next supervisor, acting for only several months, had no knowledge of that area, as she had never worked in the labor, the safety or the training areas of the agency. In November, 1994, the Director of Budget, Taylor Jones, was promoted to SES and given as an additional duty the Directorship of the Office of Labor, Training and Safety. Mr. Jones also never worked in these substantive areas. He became Petitioner's new first line supervisor. When Mr. Ellerbe's knowledgeable supervisor left in 1988, the agency rated Petitioner's position as a GS-13. Since then, the jury was told, the standards of classification changed, as did the duties and level of responsibility of Mr. Ellerbe's position, which were consistent with the changes increasing his supervisor's job status. Even though Mr. Ellerbe's immediate supervisor's job required more skills and abilities, warranting a higher pay scale, the agency refused Mr. Ellerbe's requests for an audit of the proper level for his position.

The only expert witness testifying at trial was David Knudsen, who has extensive knowledge of government position classification. Using the accepted federal classification standards and considering all the policy and other advanced assignments and independence in carrying out the duties that Mr. Ellerbe gained between 1989 and 1996, Mr. Knudsen concluded that Mr. Ellerbe was performing at a GS-14 level in 1996.

Mr. Ellerbe's position also had a policy component. Mr. Carlton and Mr. Ellerbe worked on the procedure for the Merchant Marine Academy to award retroactive degrees from the school, which Mr. Carlton testified constituted a policy issue. Mr. Carlton also testified that Mr. Ellerbe's work to increase the minority enrollment at the US Merchant Marine Academy was a policy issue.

Mr. Ellerbe regularly provided input and advice of policy issues to his supervisor and to other offices, involving numerous new agency regulations, being prepared for inclusion in the Code of Federal Regulations or as part of MARAD's policies. During his testimony, Mr. Knudsen described twelve separate situations where clear written proof existed to establish Mr. Ellerbe's direct involvement with policy issues of MARAD. Mr. Knudsen elaborated that Mr. Ellerbe was working at the GS-14 level based, in part, on the work he had performed in advising his supervisors about policy decisions, as well as his involvement in making policy decisions, the independence with which he worked and the Congressional and other high level contacts he had in his position.

Mr. Ellerbe's position as Federal Academy Analyst also included the responsibility of being the liaison between MARAD and the Merchant Marine Academy. Mr. Carlton, the former supervisor of Mr. Ellerbe who had since risen to the position of Assistant Administrator of the agency, characterized the Merchant Marine Academy as one of MARAD's most visible and important activities. An Advisory Board is empowered by law to review the operations, management and curriculum of the Merchant Marine Academy and to make recommendations to the Merchant Marines and to the Maritime

Administration. One duty of Mr. Ellerbe's was finding, evaluating and recommending persons to fill vacant seats on the Academy's Advisory Board.

Mr. Ellerbe also attended the Advisory Board meetings, held at Kings Point, New York, as the representative of MARAD. On occasion, Mr. Ellerbe attended those meetings alone, acting as the Maritime Administrator's representative. Mr. Ellerbe actively participated in the meetings. For example, on March 11 and 12, 1993, Mr. Ellerbe attended the Board meeting at the Merchant Marine Academy in place of the Administrator. During that Board meeting, Mr. Ellerbe suggested that the Academy offer a major in Intermodal studies. The Merchant Marine Academy thereafter added Intermodal studies as a major, consistent with Mr. Ellerbe's idea. Mr. Ellerbe also had the responsibility of preparing the Administrator for the Board meetings, which involved discussing the issues likely to be raised and preparing the opening remarks that the Administrator would make to the Board. These tasks required Mr. Ellerbe to maintain a current knowledge of the issues of the Academy that were significant and the position to be taken by MARAD.

Another of Mr. Ellerbe's responsibilities included monitoring a number of aspects of the lives of the students of the Academy. Mr. Ellerbe also contributed to a symposium "Women Underway," which highlighted the contributions of women in the maritime industry. He assisted the coordinating committee, planned panel topics, and wrote the keynote speech presented by the Deputy Secretary of Transportation. Dr. Jane Brickman, chair of the program, wrote to the Deputy Maritime

Administrator, praising Mr. Ellerbe for his "indispensable" support and advice before and during the symposium. The letter, an exhibit at trial, was replete with appreciation and laudatory comments.

Another part of Mr. Ellerbe's job involved the acquisition and distribution of surplus government property, often worth millions of dollars. Primarily ships, the surplus also included shipboard, marine, and computer equipment. Petitioner would survey the federal academy, the six state maritime academies, and a number of non-profit training institutes to see if there was a need for the excess items. When he found a new home for an item, he worked out the transfer from the government to the new user. This job could entail negotiating among those interested in the equipment. One example was for a large surplus ship that had U.S. Senators vying for different constituent non-profit groups. Mr. Ellerbe often received written appreciation for his efforts and admitted into evidence for the jury's consideration one such letter.

I. Promotions of Other MARAD Employees

The facts heard by the jury were that Mr. Ellerbe's immediate supervisor, Mr. Jones, made at least twelve different promotions of six different female analysts during his entire tenure at MARAD, but did not give a single promotion to a male. In his role as Director of Office of the Budget Mr. Jones generously promoted the women analysts. He promoted Ms. Brown at least two times. Mr. Jones also promoted Ms. Fitch at least two times. Ms. Le, who Jones married while still her supervisor, first rotated through the budget office as a GS-7 intern and then he

hired her as a GS-9. Mr. Jones then promoted her three times, eventually to a GS-13. Mr. Jones promoted Ms. Green to a GS-14 position, even though she did not initially even apply for promotion.

After Mr. Jones became the Director of the Office of Labor, Training and Safety, he promoted Ms. Johnson and Ms. Thomas. Mr. Jones admitted that prior to moving to that department, he had little substantive knowledge of the work performed in that office. Moreover, he did not give his full attention to OLTS until July 1996. The promotion process Mr. Jones used to elevate both Ms. Johnson and Ms. Thomas was a non-competitive grade elevation based on an employee performing higher level duties than those in her current position description.

In order to be promoted by accretion of duties, the supervisor must be involved to draft a new position description where the additional duties are delineated. An employee cannot bypass his or her supervisor by directly requesting an accretion of duties promotion from the Office of Personnel. Mr. Jones gave promotions to both Ms. Johnson and Ms. Thomas in March 1996 using the accretion of duties process. Mr. Jones testified that he was not familiar with the differences in the grade levels: "I don't know what the duties of a 13 are. I don't have duties that are described by grade, and therefore I'm not sure at what point this is a 13 duty that can't be assigned to a 12." Mr. Jones also testified that he promoted Ms. Johnson because he believed that she was performing GS-13 duties.

In comparison, Mr. Jones did not promote Mr. Ellerbe or any other male he supervised.

a. Ms. Martha Johnson

Ms. Martha Johnson, who encumbered a similar position as Mr. Ellerbe, received several promotions. Ms. Johnson began working for the Office of Maritime Labor and Training in 1992. Ms. Johnson, a GS-10 secretary at the time, applied and began as a GS-11. Mr. Carlton promoted her to the GS-12 level and Mr. Jones promoted her again to the GS-13 level. As the State Academy Officer, Ms. Johnson's responsibilities consisted of acting as the coordinator between the state maritime academies and the Maritime Administration when issues arose. She also determined the eligibility of students who received student incentive payments and monitored their obligations to MARAD. For the annual meeting of the state superintendents, Ms. Johnson prepared the paperwork and briefed the issues. She also prepared the response to correspondence from Congress and elsewhere pertaining to the state academies for the Administrator's signature. Another duty was developing comments on suggested changes in MARAD regulations regarding the state academies. She also assisted in preparing briefing books for the Administrator when he testified before Congress by gathering relevant information, as did Mr. Ellerbe and Mr. Krusa.

b. Ms. Patricia Thomas

Ms. Thomas also received a promotion non-competitively from Mr. Jones. Mr. Les Barthalow, who directed the work of Ms. Thomas prior to his retirement, was at the GS-12 level. Mr. Jones, however, promoted Ms. Thomas, Mr. Barthalow's successor, and upgraded the

position to a GS-13. Prior to Mr. Jones becoming the director of her department, Ms. Thomas had sought a promotion from Mr. Carlton to a GS-13. He testified that her additional workload did not justify a promotion beyond the GS-12 level. When Mr. Barthalow, a GS-12 retired, Ms. Thomas testified that her department implemented a new computerized system that made her job easier than when performed by Mr. Barthalow. Her job became more streamlined after Mr. Barthalow retired. Ms. Thomas requested an accretion of duties promotion from Mr. Jones in February 1995. Ms. Thomas also provided Mr. Jones with two position descriptions, Mr. Barthalow's GS-12 job duties and her own GS-12 position description. Mr. Jones deemed that Ms. Thomas should receive an accretion of duties promotion to a GS-13.

Mr. Knudsen was accepted as an expert in the area of position classification within the federal government. He testified that grade level depends on the quality and complexity of the duties of the position. Therefore, it is not possible to elevate a GS-12 position to a GS-13 grade level by adding duties from another GS-12 position. Mr. Knudsen explicitly stated that if the work of two GS-12s are combined, the resulting grade for the whole job will remain a GS-12. Appellee made no attempt to refute Mr. Knudsen's statements.

c. Ms. Joyce Green

Ms. Green received one promotion from Mr. Jones, into her present position as a Supervisory Budget Analyst. Mr. Jones, Ms. Green's supervisor, elected to promote her to a GS-14 after competition with a male.

There was an advertised vacancy for the GS-14 position, but Ms. Green had elected not to pursue this promotional opportunity. Thereafter, Mr. Jones approached Ms. Green to discuss the GS-14 vacancy. He convinced her to overcome her reluctance to submit an application by stating that it would benefit her career. Ms. Green did apply as did a qualified male from the Coast Guard. Mr. Jones interviewed both, and then he selected Ms. Green.

With this particular vacancy, Mr. Jones had a chance to increase the number of staff he had by hiring someone from outside MARAD to fill the position. Ms. Green testified that their office was very busy and could use more people. Mr. Jones still approached Ms. Green, convinced her to apply for the vacancy, and selected her rather than the male for the GS-14 position. By selecting Ms. Green for the GS-14 position, Mr. Jones lost the opportunity to increase his staff.

d. Ms. Le Jones

Ms. Le Jones, another woman Mr. Jones directly supervised, received three promotions from him. Ms. Jones began working at the Maritime Administration in July 1992 as a GS-9 Budget Analyst with a career ladder to a GS-12. As soon as Ms. Jones was eligible for promotion, Mr. Jones awarded it to her. Mr. Jones promoted her twice within her career ladder and then to a GS-13. Mr. Jones and Ms. Le Jones had a personal relationship that became public in 1995. Mr. Jones told his supervisor of his intimacy with Ms. Le in December. The following July 1995, as Ms. Le testified, she married Mr. Jones. Until the

day of her marriage, Taylor Jones remained her supervisor. Mr. Jones testified that a relationship with his subordinate may be inappropriate. When Mr. Jones was a supervisor years before, while employed at the Department of Treasury, he had an affair with a subordinate. Mr. Jones further admitted that, when his supervisor learned of that relationship, he was warned about its inappropriateness, yet repeated it at MARAD.

II. Mr. Ellerbe's Efforts to Receive a Promotion

Mr. Ellerbe could not get a promotion despite several requests. Mr. Ellerbe approached Mr. Carlton several times about a promotion. Mr. Ellerbe also asked Mr. Jones for a promotion, but met resistance. Further, Mr. Ellerbe could not get a desk audit to determine if he was eligible for a non-competitive promotion.

Mr. Ellerbe alleges he was discriminated and retaliated against when the agency refused to promote him despite the fact that he was performing GS-14 work. The agency had done a study of the position in 1988, prior to the changes in the standards of classification and the position description, both of which were outdated. Using the right standards and considering all the policy and other advanced assignments and independence Mr. Ellerbe gained between 1989 and 1996 in carrying out his duties, Mr. Knudsen, a classification expert, concluded that Mr. Ellerbe was performing at a GS-14 level. This testimony was uncontroverted.

Mr. Knudsen elaborated that Mr. Ellerbe was working at the GS-14 level based on the policy work he had

performed in advising his supervisors about policy decisions, as well as his involvement in making policy decisions, the independence with which he worked and the Congressional and other high level contacts he had in his position. In contrast to Ms. Johnson, though, Mr. Ellerbe could not even receive a desk audit. After Mr. Ellerbe requested a desk audit, Ms. Gilson, the Director of Personnel, sent Mr. Ellerbe a memo requesting an updated position description since his position description dated back to 1988. The updated position description needed Mr. Jones' signature, as Mr. Ellerbe's supervisor. Mr. Ellerbe sent back the updated position description, but Mr. Jones would not provide his signature.

Ms. Gilson, unable to process the desk audit without Mr. Jones' signature, sent Mr. Jones a memo asking him to review the updated position description and to provide certain pertinent information about Mr. Ellerbe's position. Ms. Gilson made clear to Mr. Jones that a desk audit could not be performed without the requested information. Mr. Jones did not respond to that memo. The General Counsel's Office informed Ms. Gilson that Mr. Ellerbe had an EEO claim. Ms. Gilson testified that she then stopped processing his request because, she had taken his EEO complaint about his classification to court. When she first arrived at MARAD, Ms. Gilson sent a memo to all supervisors, including Mr. Jones, stating that if any of the position descriptions for employees were older than 1992, they had to be updated. The purpose of her memo was to ensure that the position descriptions accurately described the employees' duties. Mr. Jones did not provide an updated position description for Mr.

Ellerbe although his position description from 1988 was seriously outdated.

III. Mr. Jones' Disparate Treatment of Men

When Mr. Jones first arrived as the Director of the Office of the Budget, he had two male subordinates, Mr. Irby and Mr. Jenkins. Neither one of them received a promotion under Mr. Jones. Both left while Mr. Jones was their supervisor. Mr. Jenkins stated that his treatment by Mr. Jones and the failure to be promoted were the reasons for his departure.

Mr. Jenkins, a male, began his career at MARAD in an identical fashion to Ms. Le Jones, as a GS-7 intern in the Budget Office with Taylor Jones as his immediate supervisor. As with Ms. Le, Mr. Jones selected Mr. Jenkins for a GS-9 position with a career ladder to a GS-12. Mr. Jones was his first line supervisor. Unlike Ms. Le, however, Mr. Jones chose not to promote Mr. Jenkins in his career ladder. Ms. Gilson testified that in order to be promoted within a career ladder, a person need only be in the position for one year and receive a rating of fully successful. Mr. Jenkins met both those criteria. Still, Mr. Jones did not promote him. Mr. Jenkins was the only person that Mr. Jones did not promote in a career ladder which caused him to leave the agency.

Ms. Green, a witness favorable to management, admitted that Mr. Jones could not supervise Mr. Jenkins possibly because of a "male/male" problem and that Ms. Green as a female may be a better supervisor than Mr. Jones as a male.

The testimony of Mr. Jones also revealed that men and women were being treated differently with regards to their performance evaluations. In summary, all the women he supervised received the highest evaluations and none of the men did. Another area of stark contrast was the disciplinary actions taken by management against the men. Mr. John Mellis testified that he had been placed on AWOL on three separate occasions by Mr. Jones: once for fifteen minutes because he had gone across the street for a meeting and once because he had to leave work with a family emergency. Mr. Mellis had never been placed on AWOL before in his long government career. Mr. Mellis also testified that he had lost one week of leave due to Mr. Jones' actions.

In addition, other men, including Mr. Ellerbe, were severely reprimanded for minor or imagined infractions. After Mr. Jenkins did not receive a promotion, he met with Mr. Jones to find out why. Although he acknowledged that his meeting with Mr. Jenkins was animated, Mr. Jones testified that no profanity was used. Mr. Jenkins testified differently. Immediately after the meeting, Mr. Jenkins wrote the exact words Mr. Jones used to address him. That recitation is laced with unnecessary vulgarities by Mr. Jones. Mr. Jones' testimony was in direct contradiction to that of Mr. Jenkins. Mr. Ellerbe suffered similar encounters with Mr. Jones. Mr. Jones yelled at Mr. Ellerbe because he wrote a memo with a subject heading that was three lines long and yelled at him again because a secretary, Kim Rester, who corroborated Mr. Ellerbe's assertions, volunteered to help him by typing a document. In addition, on January 17, 1996, Mr. Jones screamed at Mr. Ellerbe to the extent where Mr. Ellerbe, a former varsity

football player, was frozen in fear and shock and could not move. Mr. Jones, a large man, advanced on him yelling at Mr. Ellerbe to get out of his office. Mr. Ellerbe was left shaking after the incident as was Ms. Johnson, his co-worker who merely witnessed the tirade.

Several others testified that Mr. Jones' anger was exhibited at men only. Ms. Morgan, who worked off and on in OLTS for many years, testified that Mr. Jones yelled only at the men in the office. She recounted a memorable and loud incident involving Christopher Krusa. She testified that Mr. Jones had never yelled at her. Pearlie Joyner, the office secretary, also testified that Mr. Jones yelled only at men. John Mellis testified that he had been yelled at by Jones and that he had heard Jones yelling at another male (Christopher Krusa), but he had never heard Mr. Jones yell at females. The jury also heard testimony about the denial of Mr. Ellerbe's leave. Mr. Ellerbe had asked for time off around the Christmas holidays. Mr. Jones claimed to have lost his request for leave although Pearlie Joyner, her secretary, was quite clear that she had given it to Mr. Jones. After Mr. Jones found the request, however, he denied the leave telling Mr. Ellerbe that he had to complete an assignment that was not time sensitive before he could leave for his vacation. Mr. Ellerbe lost seventy nine hours of leave. Although the federal government has a means of restoring such leave that would otherwise be lost under the "use it or lose it" system, Mr. Jones refused to restore the leave, claiming that Mr. Ellerbe did not follow proper procedures.

IV. Mr. Ellerbe Engaged in Protected Activity

Mr. Ellerbe filed an EEO complaint in 1995. Memorandum at 8. Mr. Ellerbe also was a participant in *Harrison v. Lewis*, 595 F. Supp. 493 (D.D.C. 1983), which involved a class of black and female employees suing for discrimination in promotions. Although recruited to be a witness for management, Mr. Ellerbe revealed that he had been promised a promotion to a GS-13, but had not received it. MARAD was found to have violated Title VII in its treatment of blacks for promotion.

Mr. Jones testified that he had spoken with Mr. Ellerbe about his involvement in the class action. Mr. Jones also spoke with Mr. Ernest Hawkins who served as the Agency EEO Officer and was an adverse witness to Mr. Ellerbe in the *Harrison* litigation. Finally, Mr. Jones testified that he had heard and knew about Mr. Ellerbe's other EEO complaints and grievances including the 1995 EEO charge.

In addition, employees of the agency knew that Mr. Ellerbe had previously complained about discrimination. Ms. Morgan had heard of his reputation before she met him. Other witnesses, including Ms. Tosi and Ms. Thelma Moore, also testified regarding Mr. Ellerbe's reputation as one who complained about his treatment regarding promotions denied.

At the conclusion of the evidence, the jury was asked to render its opinion as to two factual issues: (1) whether or not Mr. Ellerbe had been denied a promotion because of his sex; or because he had engaged in protected activities; and (2) whether or not he had been denied his earned annual leave because of his sex or because he had

engaged in protected activities. The jury resolved both in favor of Petitioner.

The writ of certiorari should be granted to resolve these questions.

REASONS FOR GRANTING THE PETITION

I. The lower courts erred in excluding relevant evidence by applying the District of Columbia Circuit's comparator standard, which is more restrictive than other circuits.

There is a conflict of substance between the circuits as to the standard that plaintiffs need to meet in civil rights cases, here Title VII of the Civil Rights Act of 1964, involving employees who claim harm from a tangible employment action. Generally, under a disparate treatment claim in Title VII, an employee must demonstrate that he or she is "similarly situated" to those with whom he or she compares himself or herself. *McDonnell-Douglas v. Green*, 411 U.S. 792 (1972). The issue presented here is the difference between the circuits in what is required to prove "similarly situated" standard.

In the District of Columbia Circuit, "in order to show that he or she is 'similarly situated' to the employees with whom he or she compares himself or herself, the plaintiff must demonstrate that all the relevant aspects of his or her employment situation were 'nearly identical' to theirs." (Dist. Ct. Opinion p.5 (citing *Neueren v. Aducci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir.

1995)). Since the Petitioner did not meet this high threshold, the District Court excluded all relevant evidence dealing with similarly situated employees. It ruled accordingly that the remainder of admissible evidence is insufficient to make out a *prima facie* case of sex discrimination, granting respondent's motion for judgment as a matter of law. Moreover, there is a line of cases that demonstrate the continuous application of "nearly identical" standard by the District of Columbia Circuit. *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1554 (D.C. Cir. 1997); *Christopher v. Billington*, 43 F. Supp. 2d 39, 50 (D.D.C. 1999), *aff'd*, 1999 WL 1336221 (D.C. Cir. 1999).

As opposed to the District of Columbia Circuit, other circuits apply less stringent standards, following the basic rule that after trial the record should be viewed in the light most favorable to the verdict.

The Tenth Circuit applies a test more likely to allow relevant evidence to be presented to a fact-finder. These are reviewed in *Aramburu v. The Boeing Company*, 112 F.3d 1398 (10th Cir. 1997). Noting that disparate treatment requires comparison to a similarly situated person in a disciplinary termination case, the court quotes from *Wilson v. Utica Park Clinic, Inc.*, 76 F.3d 394, 1996 WL 50462 (10th Cir. 1996). "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." The *Aramburu* court further states that "[a] court should also compare the relevant employment circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees in determining whether they are similarly situated."

The D.C. Circuit did not do so here. The court of appeals looked at only one of six comparators presented and declared that her grade level undermined the consideration of the circumstances of her promotion.

The D.C. Circuit rejected, without comment, the other comparators who had the same supervisor, with power to promote and who were evaluated by that person for promotions, using the identical personnel procedure. The regimented focus on the specifics of the positions held by the various comparators is illogical, as the supervisor was not so limited when he made promotion decisions as to Petitioner and the comparators.

The First Circuit's test is "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. . . . Exact correlation is neither likely nor necessary, but the cases must be fair congeners." *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989); *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 38 (1st Cir. 1998).

The Seventh Circuit applies only a slightly modified general standard and does not define it further. In order to prove intentional discrimination, plaintiff needs to present evidence that "employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment." *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (citing *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 728 (7th Cir. 1986)); *Huff v. UARCO, Inc.*, 1222 F.3d 374, 380 (7th Cir. 1997). The open approach

allows trial judges to factor in other circumstances as appropriate.

The Eighth Circuit also does not apply any specific limitations but states broadly that a plaintiff has to present comparative statistical data which "might suggest that equal employment opportunity was not the [employer's] prevailing policy" which is "alone sufficient to constitute a prima facie case." *Naraine v. Western Electric Co.*, 507 F.2d 590, 594 (8th Cir. 1974); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988); *accord, Spurlock v. United States Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972).

Here, the lower courts compounded the error by requiring that the evidence go through the comparator's filter, even though the matter had already been tried by a jury. Ignoring *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), the court of appeals clearly restates that the evidence must comform to that set forth in the comparator standard, even after trial. (App. 3 n.1.)

II. Lower courts violated Petitioner's Seventh Amendment rights by setting aside the determination of a jury by making their own determination as to how factual evidence should be interpreted.

As this Court recently observed by Justice Scalia, the historical preference is for judges to resolve legal questions while the juries make primarily factual determinations:

> "[This] fact-law dichotomy is routinely applied by the lower courts in deciding cases. For instance, in cases alleging retaliatory discharge

> of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech."

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (Scalia, J., concurring in part and concurring in the judgment) (citing *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998)).

Galloway v. United States, 319 U.S. 372 (1943) is to the same effect. The court approved the use of Rule 50, despite its tension with the Seventh Amendment. The Court notes the role that courts play to monitor the evidence that a jury later evaluates. Here, the monitoring was too restrictive, in effect denying the right to trial, or at least overstepping the bounds of the reexamination of evidence allowed by the Seventh Amendment.

In a similar civil rights situation, pursuant to 42 U.S.C. § 1983, this Court concluded that an individual seeking redress for an invasion of his right under federal law must be afforded the same rights as those who seek redress for interference with protected personal or property interests. *Del Monte Dunes*, 526 U.S. 687. This includes the right to have the jury, rather than the judge, determine the question of liability.

This holding is consistent with other decisions by the Court over the years. If it is a factual dispute, it must be resolved – and it must be resolved by the finder of fact. Since the issue of intent is a required aspect after proof and since few people admit to such unlawful activity, a broader scope of evidence must be allowed than currently

available in the District of Columbia. As this Court once observed, "There will seldom be 'eyewitnesses' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Thus, evidence of disparate treatment of co-workers is highly probative of the intent of supervisors and the courts' rejection of such evidence was harmful error.[1]

Writ of certiorari should therefore be granted because the appellate court improperly invaded the province of the jury reserved to it by the Seventh Amendment to the U.S. Constitution.

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[1] The factual mistakes from the Record by the courts below may not by themselves warrant this Court's attention, but knowledge of these mistakes certainly undermine the credibility of the judiciary. *Montana v. United States*, 440 U.S. 147, 154 (1979). This Court's correction of the legal error's cited above will also address these mistakes.

CONCLUSION

The Supreme Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted this 2nd day of August, 2001.

Ellerbe Crawford, *Petitioner*

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Counsel for Petitioner

**Counsel of Record*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 00-5101 **September Term, 2000**

Crawford Ellerbe,
Appellant

97-CV-1553

(**Filed** Feb. 26, 2001)

v.

Norman Y. Mineta,
Secretary, Department of
Transportation,
Appellee

Appeal from an Order of the United States District Court for the District of Columbia

Before: HENDERSON and RANDOLPH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

JUDGMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). Accordingly, for the reasons set out in the accompanying memorandum, it is

ORDERED that the judgment of the district court be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

/s/ Mark J. Langer
Mark J. Langer
Clerk

MEMORANDUM

Appellant Crawford Ellerbe appeals the district court's post-verdict judgment as a matter of law in his Title VII gender discrimination suit against the Department of Transportation (Department). Because Ellerbe failed to prove discrimination, we affirm the district court's judgment.

Since 1983 Ellerbe has worked as a GS-13 "Federal Academy Program Analyst" in the Office of Maritime and Labor, Training and Safety of the Maritime Administration of the Department of Transportation. In this position he monitors graduates of the United States Merchant Marine Academy to ensure they fulfill their service obligations and he handles waiver and deferment requests. He brought this action alleging that Taylor Jones, Director of the Office of Maritime and Labor, Training and Safety since 1994, should have reclassified his position as GS-14 but did not on account of Ellerbe's gender. He also alleged Jones denied an annual leave request Ellerbe made in December 1995 and later refused to restore leave in retaliation for Ellerbe's deposition testimony in *Harrison v. Lewis*, 559 F. Supp. 943 (D.D.C. 1983), an employment discrimination suit against the Department, and for

his having filed an EEOC discrimination complaint in 1995. At the close of a ten-day trial in May 1999 the jury returned a verdict in Ellerbe's favor, awarding him compensatory damages of $75,000. In a memorandum opinion and order filed February 4, 2000 the district court granted the government's motion for judgment as a matter of law and dismissed the complaint. Ellerbe appealed.

First, the district court correctly held that Ellerbe failed to produce evidence of discriminatory animus.[1] Ellerbe maintains discrimination can be inferred from Jones's disparate treatment of a "similarly situated" female employee, Martha Johnson, whom Jones reclassified from a GS-12 to a GS-13. Not so. Assuming Johnson and Ellerbe were similarly situated, meaning that "all of the relevant aspects of [their] employment situation were nearly identical," *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (internal quotation omitted), there was no disparate treatment because each was appropriately classified at the same grade, GS-13.

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[1] Ellerbe asserts that because his suit persisted through trial it was error for the court to rely on his failure to make out a *prima facie* case. It is true that when a "case has been tried, . . . the question whether [the plaintiff] established a *prima facie* case is . . . irrelevant." *Barbour v. Browner*, 181 F.3d 1342, 1347 (D.C.Cir. 1999) (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); alteration and elipses added). "This does not mean, however, that in our analysis of 'the ultimate question of discrimination *vel non*,' [460 U.S.] at 714, we are obliged to pretend that there is evidence supporting a *prima facie* case when in fact there is not." *Id.*

Ellerbe also argues discriminatory intent from Jones's refusal to obtain a "desk audit" of Ellerbe's position to determine whether it should be upgraded to a GS-14. The record reveals, however, that the audit process, which was initiated upon Ellerbe's request, was terminated not by Jones but by the Director of Personnel at the behest of the Department's Chief Counsel after, and apparently because, Ellerbe filed this action. While the decision to cancel the audit may have been irregular, it does not demonstrate discriminatory intent by Jones who had no part in it.

Finally, with regard to Ellerbe's retaliation claim, the time lapse between Jones's denial of leave and Ellerbe's testimony in *Harrison* – at least 12 years – is simply too long to support an inference of retaliatory motive. *See Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985) ("The causal connection component of the *prima facie* case may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place *shortly* after that activity.") (emphasis added). Nor was there evidence that Jones was even aware of Ellerbe's 1995 EEOC complaint, in which Jones was not involved, when he denied Ellerbe's leave request.

MANDATE: Issued 5/22/01

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRAWFORD ELLERBE,

Plaintiff,

v.

Civil Action
97-01553 (HHK)

RODNEY E. SLATER, Secretary
United States Department of
Transportation

Defendant.

MEMORANDUM

(Filed Feb. 04, 2000)

Following a trial of this Title VII case, a jury returned a verdict for plaintiff, Crawford Ellerbe. The jury determined that defendant had engaged in "reverse" sex discrimination when Ellerbe's supervisor, Taylor Jones, failed to promote him to GS-14 in Ellerbe's position as a Federal Academy Program Analyst. The jury also determined that Ellerbe's non-promotion and lack of success in persuading Jones to restore leave Ellerbe had lost in December 1995 were causally related to Ellerbe's participation in protected EEO activity. Before the court is defendant's renewed motion for judgment as a matter of law or, in the alternative, for a new trial. Upon consideration of defendant's motion, the opposition thereto, and the evidence presented at the trial, the court concludes that defendant's motion for judgment as a matter of law must be granted.

I

Ellerbe is a well-educated African-American male who is employed by MARAD[1] in the Office of Maritime Labor, Training and Safety (OMLTS) as a Federal Program Analyst. Since December 1994, Taylor Jones, an African-American male, has been the Director of OMLTS and Ellerbe's supervisor.[2]

As a GS-13 Program Analyst, Ellerbe's primary responsibility is to monitor the graduates of the United States Merchant Marine Academy to ensure that they fulfill their various service obligations and to process requests for waivers and deferments from these obligations. Ellerbe has also served as the contact for the Advisory Board of the Academy and the Congressional Board of Visitors to the Academy and has performed significant work in connection with the effort to obtain veterans' benefits for merchant seaman [sic] who served during World War II. In every relevant respect, Ellerbe is a conscientious and competent employee.

Ellerbe started his employment with MARAD as a GS-12 Federal Academy Program Analyst in 1981 and was promoted shortly thereafter, in 1983, to the GS-13 level. Since that time, Ellerbe has attempted without success to be promoted to GS-14. He has never applied for a GS-14 position, however. Rather, he has sought to have

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[1] MARAD is a division of the Department of Transportation.

[2] For a period of time, starting in December 1994, Jones was both the Director of OMLTS and Director of MARAD's Budget. When he served in both capacities, Jones worked out of his office in the Budget Office.

his GS-13 position reclassified as GS-14 due to accretion of duties. While Ellerbe's most recent supervisors, Bruce Carlton and Jones, testified that they did not believe that Ellerbe's responsibilities warranted a GS-14 classification, plaintiff's expert witness, David Knudson, testified that Ellerbe's "policy work" and operational responsibilities did merit such a classification.

While Ellerbe has not been successful in gaining a promotion to GS-14, several female employees supervised by Jones have been promoted, often through the accretion of duties process. Patricia Thomas started working at MARAD in 1973 as a GS-3 clerk stenographer and worked her way up to a GS-9 Labor Analyst position. After taking off a year in 1984 to obtain a degree in Business Management and Information Systems, Thomas returned to OMLTS, working from 1986 to 1996 as a Maritime Data Analyst. In this capacity she worked closely with Lester Bartholow, a GS-12 Maritime Data Analyst. When he retired in 1995, she assumed his duties as well as new duties involving computerizing and programming labor reports and studies. According to Jones, he supported Thomas' promotion to GS-13 Maritime Data Analyst because of her accretion of duties.

Martha Johnson began her work for MARAD in 1964 as a GS-2 clerical employee. She was a GS-10 secretary to the Deputy Administrator when she began her work in OMLTS. She worked her way up in the agency, acquiring more skills over the years, before being promoted to the GS-12 level by Bruce Carlton. After Jones succeeded Carlton as Johnson's supervisor and following Jones' favorable recommendation, Johnson was promoted in 1996 to the GS-13 level, through the accretion of duties process.

Joyce Green began working at MARAD in 1973 as a GS-5 Budget Clerk. She, too, worked her way up in MARAD, obtained an accounting degree from Howard University, and was promoted through the accretion of duties process to a GS-12 Budget Analyst position. Thereafter, she applied for a vacant GS-13 position and was competitively selected for the position by a Mr. Nottingham, Taylor Jones' predecessor in the Budget Office. After Dick Irby, a GS-14 Budget Analyst, left the Budget office, a vacancy announcement was posted for a GS-14 Budget Analyst position. Taylor Jones interviewed and competitively selected Green, who had applied for the position.

Diem-Linh Le began her work at MARAD as a GS-9 Budget Analyst in MARAD's Budget Office. Jones was her supervisor. By 1994, Le had advanced to the GS-12 level. In 1995, Le applied for a GS-13 Budget Analyst position and was selected for the position by Jones. Thereafter, in February of 1996, Le was promoted through an accretion of duties to GS-14. At this time Thomas Brunnell, the Director of the Budge Office, was her supervisor, an arrangement that Jones and Brunnell thought was advisable in view of the romantic relationship that had developed between Le and Jones.

The fact that female employees were promoted under Jones, and the frequency of such promotions, when contrasted with Ellerbe's lack of success in achieving a promotion to GS-14, is the backbone of Ellerbe's sex discrimination claim. Ellerbe also attributes his lack of success in obtaining a promotion and restoration of his leave to Taylor's animus against him for having complained about race discrimination at MARAD. In support

of this claim. Ellerbe presented evidence that Jones knew that Ellerbe had provided deposition testimony in connection with a race and sex discrimination class-action case against the Department of Transportation in 1983, see *Harrison v. Lewis*, 559 F. Supp. 9 43 (D.D.C. 1983).[3] Moreover, evidence was presented at the trial that Ellerbe had a reputation at the agency for being a "complainer."

II.

In considering defendant's motion for judgment as a matter of law, this court employ a deferential standard. The jury's verdict must be allowed to stand " 'unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.' " *Duncan v. Washington Metropolitan Area Transit Authority*, 2000 WL 45501, *2 (D.C. Cir. Jan. 28, 2000) (quoting *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999) (in turn quoting *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998))). The plaintiff in a Title VII promotion case involving an employee denied increases in pay or grade must show that he is "similarly situated" to those with whom he compares himself. *See, e.g., Cones v. Shalala*, 1999 WL 1218001, *4 (D.C. Cir. Jan. 4, 2000). Defendant argues that the evidence presented at the trial was insufficient to show that Ellerbe was "similarly situated" to the female employees who received promotions when Jones was their supervisor. Indeed, defendant

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[3] MARAD was found to have engaged in disparate treatment race discrimination but not sex discrimination.

argues that the undisputed evidence shows just the opposite.

In order to show that he was "similarly situated" to the female employees with whom he compared himself, Ellerbe had to demonstrate that all the relevant aspects of [his] employment situation were "nearly identical" to theirs. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1554 (D.C. Cir. 1997); *Christopher v. Billington*, 43 F. Supp. 2d 39, 50 (D.D.C. 1999), *aff'd*, 1999 WL 1336221 (D.C. Cir. 1999). Ellerbe manifestly was not similarly situated to these women.[4] Among other things, the grade level of the promotions given to Ms. Johnson and Ms. Thomas distinguishes them from Ellerbe. Ellerbe was already a GS-13 and sought a promotion to GS-14. Employees with different grade levels are not "similarly situated." *See Kendall v. Block*, 821 F.2d 1142, 1147 (5th Cir. 1987). With respect to Ms. Green and Ms. Le, these employees worked in a different office, had different duties, were in a different job series, and had different professional backgrounds from Ellerbe.

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[4] Ellerbe's response to defendant's argument that he failed to show that he was similarly situated to the women with whom he compares himself boils down to the following statements: (1) "Ms. Johnson held a similar job to Mr. Ellerbe," (2) "Ms. Green sat in a professional level GS-13 position," and (3) "The same person who granted Ms. Green the GS-14 promotion denied the same to Mr. Ellerbe." Pl.'s Response at 3. Suffice it to say that these statements of undisputed fact do nothing to rebut defendant's argument.

Because the evidence presented at the trial failed to make out a prima facie case of sex discrimination, defendant is entitled to judgment as a matter of law. Moreover, Ellerbe failed to present evidence from which it could reasonably be inferred that Jones' explanation for not recommending an accretion of duties promotion for Ellerbe to GS-14 was a pretext. Jones and his predecessor, Bruce Carlton, testified that they thought Ellerbe's position was classified properly at the GS-13 level. The fact that plaintiff's expert witness disagreed – and was "right" – does to tend to show that Jones' statement of what he believed was untrue. The essential point of the testimony of plaintiff's expert witness is that Ellerbe's position, along with all others in series, should have been reclassified after the Office of Personnel Management issued new and more specific guidelines. No positions were reclassified as a result of these guideline changes, however.

III.

Ellerbe charges that his superiors at MARAD unfairly labeled him a "complainer" and engaged in reprisals against him for his complaints and for having given a deposition in the *Harrison* class action, a race discrimination case successfully prosecuted on behalf of MARAD's African-American employees.

To prevail on his retaliation claims Ellerbe was required to produce evidence sufficient to show (1) that he had engaged in protected activity, (2) that he was subjected to an adverse employment action, and (3) that the adverse action was causally related to his protected

conduct. *See, e.g., Carney v. American University*, 151 F.3d 1090, 1095 (D.C. Cir. 1998); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 202 (D.C. Cir. 1997). Defendant concedes that Ellerbe engaged in protected activity but argues that the evidence was insufficient to show that there was any causal connection between that activity and the actions about which Ellerbe complains. With respect to Ellerbe's participation in the *Harrison* case, defendant argues that the lengthy period of time between Ellerbe's deposition in the *Harrison* case and the employment actions at issue here – some 12 to 13 years – does not permit an inference of causation. This is particularly true, defendant argues, when one takes into account that the alleged discriminating official is, like Ellerbe, an African-American, who had no involvement whatsoever in that case. In fact, Jones was not even employed with the Department of Transportation at the time of the *Harrison* litigation. As for other specific EEO complaints Ellerbe may have made and his reputation generally as a "complainer," defendant argues that the evidence was insufficient to show that Jones even knew of these complaints before he engaged in the conduct which is the subject of this suit.

Ellerbe responds to defendant's arguments by first recounting evidence that Ellerbe had a negative reputation at the Maritime Administrator as a complainer. For example, Ellerbe cites the testimony of Gloria Tosi, who testified that the Deputy Administrator of the Maritime Administration, John Graykowski, told her that Ellerbe was a complainer because Ellerbe had complained to his congressional representative about not being promoted. Ellerbe argues that "[t]he jury was entitled to make the

inference that high level management did not like the fact that Plaintiff had sought redress through Congress and that it was viewed as complaining about the issue of his non-promotion." Pl.'s Opp. to Def.'s Motion for Judg. at 4. Ellerbe also points to the testimony of MARAD employees Myra Morgan and Thelma Moore. These witnesses testified that they knew of Ellerbe's reputation as a complainer. Moore also said that the Director of EEO, Ralph Ferguson, told her that she was taking too much time to investigate Ellerbe's claims.[5] Finally, Ellerbe recalls the testimony of the Director of Personnel, Sheri Gilson, who "testified without remorse that once Ellerbe filed this discrimination case in court, she ceased, on her own initiative, to process [Ellerbe's] independent request for a desk audit." Pl.'s Opp. to Def.'s Motion for Judg. at 5.

Ellerbe meets the obvious force of defendant's argument regarding the remoteness of his deposition in the *Harrison* case by pointing out that Ellerbe filed "another complaint in 1995, less than one year before he was again passed over for promotion." Pl.'s Opp. to Def.'s Motion for Judg. at 6. In this complaint Ellerbe charged that he was denied management training because of his race and in retaliation for his prior EEO activities. He argues that "a close proximity in time can prove the causal connection which underpins a claim of retaliation" and cites cases in which courts have held that the length of time between the protected activity and the alleged adverse action was not so remote that it negated a showing of a causal relationship between the two. Pl.'s Opp. to Def.'s

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[5] Moore was an EEO counselor.

Motion for Judg. at 6 (citing *Shelborne v. Runyon*, 1997 U.S. Dist. LEXIS (D.D.C. Aug. 21, 1997); *EEOC v. Locals 14 and 15*, 438 F. Supp. 876 (S.D.N.Y. 1977); *Hochstadt v. Worcester Foundation*, 425 F. Supp. 318 (D. Mass. 1976)).

Ellerbe's characterization of the evidence and speculation regarding the motives of persons vaguely identified as MARAD's "high level management" cannot substitute for relevant evidence probative of his claims in this dispute. As defendant points out, this court's pretrial order conclusively established the issues of fact and law in this case. The parties' joint pretrial statement, which was adopted by the court as the pretrial order, identified Taylor Jones as the official responsible for Ellerbe not gaining a GS-14 promotion and not restoring his leave. The Pretrial Statement reads:

> Plaintiff alleges that he has been the victim of sex and race discrimination and retaliation. Plaintiff asserts that his supervisor, **Taylor Jones**, discriminated and retaliated against him when **Mr. Jones** promoted four females, Ms. Thomas, Ms. Johnson, and Ms. Le to a GS-13 and Ms. Green to a GS-14, but failed to promote him to a GS-14 Federal Academy Program Analyst; when **Mr. Jones** gave him a "meritorious" performance appraisal for the 1994-1995 rating period; when **Mr. Jones** was verbally abusive to him and threatened to cite him for insubordination on January 17, 1996. . . . "

Joint Pretrial Statement at 2 (emphasis added). The statement of Ellerbe's claims under the section of the Pretrial Statement captioned "CLAIMS AND DEFENSES" is no more specific or inclusive. *Id.* at 2-3.

If Ellerbe intended to base his claims on the conduct and motivation of persons other than Jones, he had an obligation to say so. Having made no such claims, the evidence as to what Graykowski said to Tosi, Myra Morgan's and Thelma Moore's knowledge regarding Ellerbe's reputation, and Sheri Gilson's decision not to accede to Ellerbe's request for a desk audit is bereft of probative value as it is not connected in any way to Jones. The only evidence presented to the jury that was relevant to Jones' alleged retaliatory motive was that Jones knew that Ellerbe had testified at a deposition in the *Harrison* case, some ten years earlier, and learned at some unspecified time about complaints Ellerbe had made, including a complaint alleging race discrimination by the Office of Personnel.[6] This evidence is at best "colorable" and does not provide a sufficient basis for the jury's determination that Ellerbe was not promoted and did not have his leave restored because he had engaged in protected activity.[7]

IV.

Ellerbe is a dignified, conscientious MARAD employee, who perhaps "deserved" to be promoted to GS-14 years ago. However, for the reasons explained in

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[6] Ellerbe claimed that he was a victim of race discrimination when he was first denied management training.

[7] Ellerbe can not prevail on his retaliation claim based on Jones's failure to restore his leave for the additional reason that this conduct is not an "adverse action." *See Brown v. Brody*, 1999 WL 1215304, *5 (D.C. Cir. Dec. 21, 1999) (holding that to establish a prima facie case of retaliation, a federal employee must show that he suffered "an adverse personnel action.").

this memorandum, the evidence presented at this trial was wholly insufficient to prove that Ellerbe was a victim of either sex discrimination or retaliation.

An appropriate order accompanies this memorandum.

/s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

Dated: 2/4/00

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRAWFORD ELLERBE
Plaintiff

v. Civil Action No. 97-1553 (HHK)

RODNEY E. SLATER
Defendant

JUDGMENT ON THE VERDICT FOR PLAINTIFF

(Filed May 25, 1999)

This cause having been tried by the Court and a Jury, before the Honorable HENRY H. KENNEDY, JR., Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff CRAWFORD ELLERBE have and recover of and from the defendant RODNEY E. SLATER the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00), together with costs.

NANCY MAYER-
WHITTINGTON, Clerk

Dated: May 25, 1999 By: /s/ Delores C. Nathan
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRAWFORD ELLERBE, PLAINTIFF, VS. RODNEY E. SLATER, DEFENDANT.	DOCKET NO. CA 97-1553 COURTROOM NO. 8 WASHINGTON, D.C. MAY 25, 1999 10:28 A.M.

TRANSCRIPT OF JURY TRIAL (DAY 11)
BEFORE THE HONORABLE HENRY H. KENNEDY, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[1658] THE QUESTION CLEARER, SO INFORM THE COURT.

AND YOU SHOULD REMAIN HERE IN THE COURTROOM, AND WE'LL SEE WHAT COMES FROM THE JURY.

AS I SAID, I'M HOPING THAT THE JURY WILL RESPOND TO THE NOTE QUICKLY, AND – SO YOU SHOULD PROBABLY NOT GO BACK TO YOUR OFFICES. I WOULD WANT TO BE ABLE TO COME BACK OUT AND ANSWER THAT SECOND QUESTION, EITHER AS IT STANDS OR AS REPHRASED.

(11:05 RECESS 2:53)

THE COURT: ALL RIGHT, WE'RE PROCEEDING IN THE CASE OF ELLERBE VS. SLATER. COUNSEL, I'VE RECEIVED ANOTHER NOTE FROM THE

JURY. THIS NOTE READS, "WHAT DOES 'MOTIVATING' MEAN, AS ON PAGE 12?" I ASSUME THAT THAT REFERENCE IS TO THE JURY INSTRUCTIONS. "DOES IT REQUIRE A CONSCIOUS CHOICE?"

ALL RIGHT, DO YOU WANT TO TAKE A CRACK AT THIS?

MS. SULLIVAN: YES, A MOTIVATING FACTOR IS A CONSCIOUS CHOICE. IN AN INDIVIDUAL TREATMENT CASE, THERE MUST BE INTENT, AND IN ORDER TO HAVE INTENT, IT MUST BE A CONSCIOUS CHOICE. AND I WOULD SUBMIT THAT, EVEN IF YOU LOOKED AT THE DICTIONARY, IT WOULD HAVE SOMETHING THAT WOULD INDICATE A CONSCIOUS CHOICE OR INTENT.

MR. BROWN: YOUR HONOR, I THINK IT'S ACTUALLY TWO QUESTIONS I GUESS THEY'RE ASKING. "WHAT DOES MOTIVATING MEAN?" IS MORE TROUBLING. I THINK IT WOULD BE NICE TO SEND JUST "YES," JUST "YES" BACK IN, BUT I'M NOT SO SURE THAT

* * *

[1660] MS. SULLIVAN: THAT PHRASEOLOGY IS FINE WITH ME, YOUR HONOR, I AGREE TO THAT, WHEREAS BEFORE I THOUGHT WE SHOULD HAVE ANSWERED THE QUESTION, RATHER THAN ASK FOR CLARIFICATION.

MR. BROWN: THAT WOULD WORK FOR OUR SIDE, ALSO, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, I'LL USE MY BEST HANDWRITING AND SEND THIS BACK.

ALL RIGHT, THE NOTE READS, "MEMBERS OF THE JURY: THE COURT HAS REVIEWED YOUR NOTE. A MOTIVATING FACTOR IS ONE THAT CAUSES OR INDUCES AN ACTION. IT DOES REQUIRE A CONSCIOUS CHOICE."

I HAVE SIGNED IT, AND I HAVE ALSO INDICATED THE TIME OF MY RESPONDING TO THE NOTE, WHICH IS 3:00 O'CLOCK P.M.

COUNSEL, WE'LL FOLLOW THE SAME PROCEDURE THAT WE FOLLOWED ON YESTERDAY. YOU'RE ON TWENTY MINUTES CALL. IF THE JURY HAS NOT REACHED A VERDICT BY 4:45, COME BACK AT 4:45, AND THE JURY WILL BE – THE DELIBERATIONS WILL BE ADJOURNED FOR THE DAY AT 4:45 TO RESUME 9:30 TOMORROW MORNING.

MS. SULLIVAN: THANK YOU, YOUR HONOR.

(3:15 RECESS 3:13)

THE COURT: THE JURY HAS INDICATED THAT IT'S REACHED A VERDICT. THE JURY WILL NOW BE CALLED IN TO RENDER ITS VERDICT.

(JURY IN 3:16)

[1661] THE COURT: LADIES AND GENTLEMEN, GOOD AFTERNOON.

THE JURORS: GOOD AFTERNOON.

THE COURT: I'VE RECEIVED YOUR NOTE, WHICH INDICATES THAT YOU HAVE REACHED A VERDICT. I'LL ASK MS. NATHAN TO PLEASE TAKE THE VERDICT.

THE DEPUTY CLERK: WILL THE FOREPERSON PLEASE RISE. MAY I HAVE THE VERDICT FORM, PLEASE

IN THE CASE OF CRAWFORD ELLERBE VS. RODNEY E. SLATER, WAS MR. ELLERBE DISCRIMINATED AGAINST ON THE BASIS OF HIS SEX WHEN HE WAS NOT PROMOTED TO A GS-14 POSITION?

THE FOREPERSON: YES.

THE DEPUTY CLERK: WAS MR. ELLERBE NOT PROMOTED TO A GS-14 POSITION IN RETALIATION FOR HIS PRIOR EEO ACTIVITY?

THE FOREPERSON: YES.

THE DEPUTY CLERK: WAS MR. ELLERBE DISCRIMINATED AGAINST ON THE BASIS OF HIS SEX WHEN HIS USE-OR-LOSE LEAVE WAS NOT APPROVED?

THE FOREPERSON: NO.

THE DEPUTY CLERK: WAS MR. ELLERBE'S USE-OR-LOSE LEAVE NOT APPROVED IN RETALIATION FOR HIS PRIOR EEO ACTIVITY?

THE FOREPERSON: YES.

THE DEPUTY CLERK: IN WHAT AMOUNT DO YOU FIND MR. ELLERBE IS ENTITLED TO RECEIVE IN COMPENSATORY DAMAGES?

THE FOREPERSON: SEVENTY-FIVE THOUSAND DOLLARS.

THE DEPUTY CLERK: THANK YOU.

[1662] MEMBERS OF THE JURY, YOUR FOREPERSON HAS JUST ANNOUNCED THE VERDICT. IF THAT IS YOUR VERDICT, PLEASE ANSWER YES. IF IT IS NOT, PLEASE ANSWER NO. JURY NO. 2?

JUROR NO. 2: YES.

THE DEPUTY CLERK: THREE?

JURY NO. 3: YES.

THE DEPUTY CLERK: FOUR?

JURY NO. 4: YES.

THE DEPUTY CLERK: FIVE?

JURY NO. 5: YES.

THE DEPUTY CLERK: SIX?

JURY NO. 6: YES.

THE DEPUTY CLERK: SEVEN?

JURY NO. 7: YES.

THE DEPUTY CLERK: EIGHT?

JURY NO. 8: YES.

THE DEPUTY CLERK: THE JURY HAS BEEN POLLED, YOUR HONOR, AND IT IS UNANIMOUS.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, I WANT TO THANK YOU VERY MUCH FOR DOING YOUR DUTY IN PERFORMING THIS SERVICE. I AM AWARE AND APPRECIATE THAT THIS TOOK A LITTLE LONGER THAN I HAD ANTICIPATED. YOU HAVE BEEN JUST STALWART IN YOUR WILLINGNESS

TO DO YOUR DUTY, AND I APPRECIATE IT, AND I THANK YOU ON BEHALF OF THE PARTIES AS WELL.

* * *

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5101 **September Term, 1999**
97cv01553

Filed On:
(Filed Jul. 19, 2000)

Crawford Ellerbe,

Appellant

v.

Rodney E. Slater, Secretary of U.S. Department of Transportation,

Appellee

BEFORE: Randolph, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; it is

ORDERED that the motion for summary affirmance be denied. The merits of the parties' positions are not so clear as to warrant summary action. *See Taxpayer Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

Because the court has determined that summary disposition is not in order, the Clerk is directed to calender this case for presentation to a merits panel.

Per Curiam

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5101 **September Term, 2000**
97cv01553

Crawford Ellerbe,
Appellant

v.

Norman Y. Mineta, Secretary of U.S. Department of Transportation.
Appellee

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Silberman, Senior Circuit Judge

ORDER

(Filed May 4, 2001)

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5101 **September Term, 2000**
97cv01553

Crawford Ellerbe,
Appellant

v.

Norman Y. Mineta, Secretary of U.S. Department of Transportation.
Appellee

BEFORE: Henderson and Randolph, Circuit Judges, and Silberman, Senior Circuit Judge

ORDER

(Filed May 4, 2001)

Upon consideration of appellant's petition for rehearing filed April 12, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk